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12 **IN THE UNITED STATES DISTRICT COURT**  
13 **FOR THE DISTRICT OF ARIZONA**

14 C.M., on her own behalf and on behalf of her  
15 minor child, B.M.; L.G., on her own behalf and  
on behalf of her minor child, B.G.; M.R., on her  
16 own behalf and on behalf of her minor child,  
J.R.; O.A., on her own behalf and on behalf of  
17 her minor child, L.A.; and V.C., on her own  
behalf and on behalf of her minor child, G.A.,  
18 Plaintiffs,

19 v.

20 United States of America,  
Defendant.

21 A.P.F. on his own behalf and on behalf of his  
22 minor child, O.B.; J.V.S., on his own behalf and  
on behalf of his minor child H.Y.; J.D.G. on his  
23 own behalf and on behalf of his minor child,  
M.G.; H.P.M. on his own behalf and on behalf of  
24 his minor child, A.D.; M.C.L. on his own behalf  
and on behalf of his minor child, A.J.; and R.Z.G.  
25 on his own behalf and on behalf of his minor  
child, B.P.,

26 Plaintiffs,

27 v.

28 United States of America,  
Defendant.

No. CV-19-05217-PHX-  
SRB

**OPPOSITION TO  
PLAINTIFFS'  
SUPPLEMENT TO  
MOTION FOR  
SANCTIONS**

No. CV-20-00065-PHX-  
SRB

1           The United States reiterates that it has approached its discovery obligations in this  
 2 litigation with seriousness and diligence. On February 21, 2023, the United States produced  
 3 nine pages of notes and hardcopy documents collected from Scott Lloyd, the former Director  
 4 of the Office of Refugee Resettlement (“ORR”) in the Department of Health and Human  
 5 Services (“HHS”). Of those nine pages, four pages contained redactions of deliberative  
 6 material unrelated to this litigation and material protected by the presidential  
 7 communications privilege. Following this limited production, Plaintiffs filed a Supplement  
 8 to Their Motion for Sanctions (“Supplement”). *See C.M.* ECF 367; *A.P.F.* ECF 359. In the  
 9 Supplement, Plaintiffs ask this Court to include the documents produced on February 21 in  
 10 their pending Motion for Sanctions (“Motion for Sanctions”), *see C.M.* ECF 333; *A.P.F.*  
 11 ECF 328. Specifically, Plaintiffs request: “(1) that the notes be deemed admitted at trial if  
 12 offered by Plaintiffs; and (2) that Defendant be precluded from contesting or otherwise using  
 13 the late produced notes at trial.” *C.M.* ECF 367 at 2; *A.P.F.* ECF 359 at 2. Additionally,  
 14 Plaintiffs request “leave of the Court to depose Lloyd regarding his late-produced notes.”  
 15 *See C.M.* ECF 367 at 2; *A.P.F.* ECF 359 at 2. For the reasons set forth below, this Court  
 16 should deny the relief Plaintiffs seek in their Supplement.

## 17           **I. BACKGROUND**

18           On July 18, 2022, Plaintiffs served amended Requests for Production (“RFP”),  
 19 seeking, among other things, “all handwritten notes relating to any policy or practice to  
 20 separate or separately detain immigrant parents and children after apprehension at the  
 21 Southwest Border, or the Zero Tolerance Policy, for the HHS/ORR custodians whose ESI  
 22 documents were produced in this matter, including . . . Scott Lloyd.” *See* Supplement, Ex.  
 23 C at 11-12.<sup>1</sup> The United States collected and timely produced documents responsive to this  
 24 RFP, including notes taken by Scott Lloyd. In February 2023, agency counsel came across  
 25 the additional nine pages from Mr. Lloyd that are the subject of Plaintiffs’ Supplement.  
 26 These documents were located in a folder marked for a non-relevant subject matter, and

27  
 28           <sup>1</sup> Exhibit C to Plaintiffs’ Supplement only includes the RFP submitted by *A.P.F.*  
 The *C.M.* Plaintiffs also submitted an identical RFP to the United States on the same date.

1 which did not otherwise contain anything relevant to this litigation.<sup>2</sup> As promptly as  
 2 possible following the discovery of these documents, the United States reviewed and  
 3 produced them to Plaintiffs.

## 4 II. SANCTIONS ARE NOT WARRANTED

5 As this Court is well-aware, and as explained in the United States' Opposition to  
 6 Plaintiffs' Motion for Sanctions ("Opposition"), *see C.M.* ECF 344; *A.P.F.* ECF 338, the  
 7 United States timely produced tens of thousands of documents in this litigation. That a small  
 8 number of documents was produced late "is not, by itself, evidence of discovery  
 9 misconduct." *McGhee v. N. Am. Bancard, LLC*, 2021 WL 5764708, at \*2 (S.D. Cal. June  
 10 28, 2021) (declining to issue sanctions where a relatively "small number of documents" in  
 11 a large litigation were located and produced late). Courts within this circuit have recognized  
 12 the Federal Rules of Civil Procedure "do not demand perfection." *Reinsdorf v. Skechers*  
 13 *U.S.A., Inc.* 296 F.R.D. 604, 615 (C.D. Cal. 2013). "A party may comply in good faith with  
 14 its discovery obligations and yet there may be supplemental productions or even additional  
 15 responsive documents that were inadvertently omitted. Such supplemental productions or  
 16 responses do not necessarily equate to discovery misconduct." *Id.*

17 Plaintiffs incorrectly claim that these documents should have been produced pursuant  
 18 to the Mandatory Initial Discovery Pilot program ("MIDP"). *See* Supplement at 1. In  
 19 negotiating the scope of MIDP discovery, the parties [REDACTED]

20 [REDACTED] *See* Motion for Sanctions, Ex. D at 3. To  
 21 the United States' understanding, Mr. Lloyd's documents at issue were not part of HHS's  
 22 productions to Congress, and therefore were not [REDACTED]

23 [REDACTED]. Additionally, that Plaintiffs served an RFP seeking handwritten notes  
 24 from former and current HHS employees "whose ESI documents were produced in this

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25  
 26 <sup>2</sup> Plaintiffs suggest that the United States inaccurately represented that these  
 27 documents were only recently discovered by HHS because the metadata for the documents  
 28 is from February 2019. *See* Supplement at 2, n.2. It is the United States understanding that  
 these documents were scanned in February 2019 as part of HHS's record-keeping process.  
 Neither agency counsel nor counsel for the United States was aware of the existence of these  
 documents until shortly before they were produced to Plaintiffs.

1 matter” (which included Mr. Lloyd) underscores that the pages at issue need not have been  
2 produced pursuant to MIDP. *See* Supplement, Ex. C at 11.

3 Further, delayed production of the nine pages collected from Mr. Lloyd was  
4 harmless. *Greenawalt v. Sun City West Fire Dist.*, 2006 WL 1688088, at \*3 (D. Ariz. June  
5 10, 2006) (holding that sanctions should not be imposed where the disobeying party can  
6 “substantially justify the late disclosure, or prove its harmlessness”). The topics addressed  
7 in the documents at issue are not novel, but rather were covered in other documents and in  
8 deposition testimony. For instance, one of the documents Plaintiffs specifically describe in  
9 the Supplement is a [REDACTED]

10 [REDACTED]. *See* Supplement, Ex. A at 4-7. [REDACTED]  
11 [REDACTED] were addressed in detail during the *C.M.* and *A.P.F.* Plaintiffs’  
12 joint depositions of U.S. Border Patrol agents and the *A.P.F.* Plaintiffs’ Rule 30(b)(6)  
13 deposition of the U.S. Customs and Border Protection (“CBP”) Office of Field Operations  
14 (“OFO”). Accordingly, Plaintiffs were not harmed by the belated production of these  
15 documents.

16 Additionally, Plaintiffs’ assertion that they were harmed because they were unable  
17 to take these documents into consideration when deciding which witnesses to depose or  
18 show these documents to witnesses is incorrect. By the time Plaintiffs served their RFP on  
19 July 18, 2022, they *already* had deposed all of their allotted policy-level depositions, with  
20 the exception of the Department of Homeland Security (“DHS”) Rule 30(b)(6) deposition,  
21 which the parties were in the process of negotiating. Accordingly, Plaintiffs could not  
22 possibly have shown these documents to witnesses or used these documents to determine  
23 which policy-level fact witnesses to depose because they did not request these documents  
24 until after that time.

### 24 III. CONCLUSION

25 For the foregoing reasons and the reasons set forth in its Opposition to Plaintiffs’  
26 Motion for Sanctions, *see C.M.* ECF 344; *A.P.F.* ECF 338, the United States respectfully  
27 requests that this Court deny the relief requested in Plaintiffs’ Supplement.  
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1 Submitted this 17th day of March, 2023.

2  
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**CERTIFICATE OF SERVICE**

I hereby certify that on March 17, 2023, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants.

s/ Irina M. Majumdar  
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